UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC 20591

Served: November 7, 1990
FAA Order No. 90-19

In the Matter of:	)	Docket Nos. CP89EA0058
	)	CP89EA0047
	)	CP89EA0028
	)	CP89EA0045
CONTINENTAL AIRLINES, INC.	)	CP89NM0029
	)	

DECISION AND ORDER

Respondent Continental Airlines, Inc. ("Respondent") has appealed from the oral initial decisions[1/] issued by Administrative Law Judge Daniel M. Head in the above-captioned cases at the consolidated hearing in these cases held on November 15-17, 1989, in [2/] The law judge held, in each case, that Respondent had violated section 108.5(a)(1) of the Federal Aviation Regulations (FAR) (14 CFR §108.5(a)(1)),[3/] by failing to carry out certain provisions of

1/ A copy of the law judge's initial decisions are attached.

2/ Most of the consolidated hearing record in these cases was sealed by the law judge for security reasons. Portions of this decision have been redacted for security reasons, pursuant to 14 C.F.R. Part 191. All unredacted copies of this decision must be treated in a confidential manner. Unredacted copies of this decision may not be disseminated beyond the parties to this proceeding and those carriers bound by the SSP, all of whom have been given unredacted and redacted copies.

3/ Section 108.5(a) of the FAR provides in pertinent part:

> Each certificate holder shall adopt and carry out a security program that meets the requirements of section 108.7 for each of the following scheduled or public charter passenger operations: (1) Each operation with an airplane having a passenger seating configuration of more than 60 seats.

the Standard Security Program (SSP), which had been adopted by Respondent as its security program pursuant to that regulation.

In cases CP89EA0058, CP89EA0047, and CP89EA0028 (hereinafter, "unauthorized access cases"), Complainant alleged that, in each case, an FAA special agent was able to gain access to Respondent's Air Operations Area (AOA)[4/] at a specified airport and that, although the special agent was , he remained on the AOA for 10-15 minutes by Respondent's employees. It was further alleged that Section VI.A.4. of Respondent's security program , and that, in each of these cases, Respondent had violated section 108.5(a)(1) of the Federal Aviation Regulations (FAR) in that it failed to carry out specific provisions of its security program. Complainant sought a civil penalty of $5,250 in each of these three cases. After hearing the evidence in these cases, the law judge affirmed a reduced civil penalty of $5,000 in CP89EA0058 and CP89EA0047, and a reduced civil penalty of $4,000 in CP89EA0028.

In cases CP89EA0045, and CP89NM0029 (hereinafter, "test object cases"), Complainant alleged that, on two separate occasions, at specified security checkpoints at separate

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4/ An "Air Operations Area" is that portion of an airport designed and used for landing, taking off, or surface maneuvering of airplanes. 14 C.F.R. §107.1(b)(2).

airports, Respondent's security screener failed to detect an FAA-approved test object during a no-notice test by the FAA. It was further alleged that Section XIII.D.1. of Respondent's security program requires Respondent, acting through its employees, contractors, and agents who perform screening functions, to detect each FAA-approved test object during each screening system operator test conducted by the FAA without notice and using FAA-approved test objects. It was alleged that, in each case, Respondent had violated section 108.5(a)(1) of the FAR, in that it failed to carry out Section XIII.D.1. of its security program. Complainant sought a civil penalty of $1,000 in CP89EA0045, and a civil penalty of $10,000 in CP89NM0029. The law judge affirmed civil penalties of $1,000 and $7,500, respectively.

On appeal of these five cases, Respondent has filed a separate appeal brief in each case. Complainant did not file a brief in any of the cases. Some arguments are repeated in all five cases. Respondent makes several additional arguments in each of the three "unauthorized access" cases, and advances yet another group of arguments in the two "test object" cases. For the reasons discussed below, Respondent's appeals are all denied, and the initial decisions in all five cases are affirmed. Each set of arguments will be addressed separately below.

I. Arguments common to all five cases

Respondent argues in each of the five cases that:

A. The FAA improperly separated these cases from a collection of other security violation cases which were initiated at the same time, in order to avoid the $50,000 jurisdictional limitation of section 905 of the Federal Aviation Act (49 U.S.C. App. §1475);

B. Many of the procedural rules included in the Rules of Practice in FAA Civil Penalty Actions in effect at the time of the hearing in these cases (14 C.F.R Part 13, Subpart G) were contrary to section 905 of the Federal Aviation Act (49 U.S.C. §1475) and the Administrative Procedure Act, and denied Respondent due process and equal protection of law;

C. Respondent was denied an opportunity to develop a full and complete record on the issue of the separation of functions by agency personnel because Complainant refused to release information requested by Respondent in discovery pertaining to the identity of agency personnel involved in the initiation of these cases;

D. Complainant withheld relevant and material information during discovery regarding criteria and standards used in these cases, thereby denying Respondent an opportunity for a full hearing;

E. The Rules of Practice in FAA Civil Penalty Actions in effect at the time of the hearing in these cases (14 C.F.R. Part 13, Subpart G) were improperly applied to these proceedings because the alleged violation at issue occurred prior to the effective date of those rules; and

F. The provisions of the SSP have no regulatory effect; therefore, Complainant had no authority to seek civil penalties for alleged violations of the SSP.

Most of these arguments have already been addressed and have been found unavailing in a previous case involving this respondent, In the Matter of Continental Airlines, Inc., FAA Order No. 90-12 (April 25, 1990) (hereinafter, "Continental I"). Similar arguments were rejected again in In the Matter of Continental Airlines, Inc., FAA Order No. 90-18 (August 22, 1990) (hereinafter, "Continental II"). Although the applicable portions of Continental I are briefly summarized below, the

full text of that decision should be consulted for further discussion of these issues.

A. Prosecution of these cases separately from other similar cases.

There is no requirement that all cases involving alleged security regulation violations be consolidated in one civil penalty action merely because they have been initiated at or about the same time and involve the same air carrier. Continental I, at 4-5. Thus, even though the initial documents in the test object cases (i.e., the Notice of Proposed Civil Penalty and the Complaint) appear to have been filed at the same time as similar documents in other cases involving Respondent's alleged failure to detect test objects at various airports on various dates, it was not improper for Complainant to prosecute these cases separately.[5/]

B. Alleged deficiencies in the Rules of Procedure.

As in Continental I, Respondent attacks the procedural rules which were in effect at the time of the hearing in this case without demonstrating how it was prejudiced by any of

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5/ In support of Respondent's argument that these cases were improperly separated from other security violation cases, it cites several test object cases, including the two here at issue, all of which were initiated at the same time and which were the subject of two press releases. The initial pleadings in the unauthorized access cases do not substantiate Respondent's assertions that those cases were also initiated at the same time as the group of test object cases. Accordingly, this argument is relevant only to the test object cases.

those rules. Accordingly, the argument fails to provide any basis for overturning the law judge's decisions in these cases. Furthermore, as noted in Continental I, the Federal Courts of Appeals constitute a more appropriate forum in which to attack these rules as not consistent with the U.S. Constitution, the Administrative Procedure Act (APA), and/or the agency's enabling act. Id., at 6-7. Indeed, these very arguments were made in Air Transport Association of America v. Department of Transportation, et. al., 900 F.2d 369 (D.C. Cir. 1990). The court in that case did not reach the substantive challenges to the Rules of Practice, but held that they were unlawfully promulgated because the FAA did not provide an opportunity for pre-promulgation notice and comment [6/] However, absent a specific showing that a rule led to some prejudice, I find Respondent's argument to be without merit.

C. Denial of information sought during discovery regarding personnel involved in the agency's decision to issue the complaints.

Information relating to the agency's decisionmaking process prior to the issuance of the complaint is irrelevant, and protected from discovery by the deliberative process privilege. Continental I, at 7-9. As in Continental I, Respondent has not

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6/ In accordance with the court's decision, cases pending at the time of that decision, including this case, were held in abeyance from April 13, 1990, until new rules were promulgated after notice and comment. See, 55 Fed. Reg. 27548 (July 3, 1990). Upon the extension of the civil penalty assessment authority on August 15, 1990, the agency resumed prosecution and disposition of pending cases, including this one.

overcome that qualified privilege by a showing that its actual need for discovery outweighs the harm that could result to the agency from that disclosure. Indeed, although Respondent claims that this information was necessary in order to evaluate the agency's compliance with the required separation of functions, Respondent has not even specifically alleged any violation of the APA or the agency's rules in this regard.

D. Alleged withholding of information sought during discovery regarding criteria and standards used in these cases.

Respondent makes vague assertions regarding Complainant's alleged "deliberate and willful withholding of relevant and material information" during discovery in these cases, and cites to several places in the hearing transcript. From these citations, only one discovery dispute of any arguable substance is discernable. Specifically, it appears that Complainant did not provide Respondent with copies of two intra-agency memoranda discussing recommended civil penalty amounts in test object cases.[7/] Respondent's counsel argued at the hearing that these two documents should have been provided in response to his discovery request for all agency guidelines used in

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7/ It should be noted that Respondent was provided with another intra-agency memorandum signed by the FAA's Director of Civil Aviation Security regarding the same topic. See, Exhibit Cont-2. Respondent's counsel had obtained a copy of one of the two "withheld" memoranda at an earlier hearing (see, Exhibit Cont-3), and he became aware of the other one at the hearing in these cases when an FAA witness mentioned it during his testimony.

determining the sanction, and moved to dismiss all the cases based on Complainant's failure to produce them.

The law judge denied Respondent's motion to dismiss. He found that the newly discovered memorandum should have been produced during discovery, but noted that the Rules of Practice do not authorize dismissal as a sanction for failure to produce materials in discovery. The law judge held, however, that the newly discovered memorandum could not be used in either test object case. Respondent's counsel declined the law judge's offer of a continuance, which would have provided him with additional time to review the newly discovered document if he felt it necessary.

Complainant's failure to produce the two memoranda provides no basis for overturning the law judge's decisions in these cases. As already noted in footnote 7, above, the agency attorney provided Respondent with another intra-agency memorandum (Exhibit Cont-2) containing sanction criteria virtually identical to the criteria contained in the "withheld" memorandum obtained by Respondent's counsel at the previous hearing (Exhibit Cont-3). Although the other "withheld" memorandum, which was discovered at this hearing, is not a part of the record in these cases, the law judge noted that all three sanction memoranda were "of the same nature." Furthermore, the law judge precluded any use in these cases of the memorandum Respondent did not possess prior to the hearing. Finally, and most importantly, the law judge explicitly disapproved of the "mechanical" sanction formula set

forth in the three memoranda, and applied his own judgment in setting the appropriate sanctions in these cases. Accordingly, for all of the above reasons, Respondent was not prejudiced by Complainant's failure to produce the two sanction memoranda.

E. Application of the Rules of Practice to this proceeding.

Administrative proceedings are governed by the procedural regulations in force at the time the proceedings occur, not those in effect at the time of the alleged violation. Continental I, at 10-11. Thus, up until April 13, 1990, on which date all civil penalty cases pending under the Rules of Practice in FAA Civil Penalty Actions (14 C.F.R. Part 13, Subpart G) were held in abeyance pending further rulemaking[8/], the then-current rules (effective as of September 7, 1988) were properly applied to these proceedings, all of which were initiated after the effective date of those rules.

F. Enforceability of Respondent's security plan under 14 C.F.R. §108.5.

The FAA may take enforcement action against a carrier, such as Respondent, that fails to implement the provisions of its security program because carriers are specifically required under section 108.5(a) to "adopt and carry out a security

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8/ See, Air Transport Association of America v. Department of Transportation, et. al., 900 F.2d 369 (D.C. Cir. 1990).

program that meets the requirements of section 108.7 . . . ." 14 C.F.R. §108.5(a) (emphasis added). Continental I, at 12-14. Thus, Respondent's failure to implement (i.e., "carry out") its security program (the SSP) is a violation of section 108.5(a). Id. Moreover, even if (as Respondent suggests in its appeal briefs) the SSP was a substantive rule of general applicability which was required to be published in the Federal Register -- which it is not -- it could still be enforced against Respondent because Respondent had actual and timely notice of the SSP. 5 U.S.C. §552(a)(1). Id.

Respondent again cites many of the same cases it relied on in Continental I and Continental II to support its argument that the SSP cannot be enforced as if it were a regulation. Those cases are again rejected as inapposite because they involved agency manuals which, unlike the SSP in this case, were not adopted by the parties involved, and because those cases do not involve a regulation analogous to section 108.5(a), which requires Respondent to "carry out" its security plan. Continental I, at 13. Respondent's quotation from Air Line Pilots Ass'n, Int'l v. FAA, 454 F.2d 1052, 1055, n. 7 (D.C. Cir. 1971), regarding 14 C.F.R. §121.133(a) is similarly unavailing because the circumstances of that case are distinguishable from this case, and, in any event, the court's statement is merely dictum. See, Continental I, at 14.

Respondent also asserts that, because the FAA is limited to enforcing its regulations, Respondent should not be subject to enforcement sanctions for alleged violations of provisions of

its security program which go beyond the requirements of the FAR. Respondent's argument is not persuasive. While it is true that Part 108 (specifically, section 108.7 and the regulations referred to therein) sets forth general requirements and identifies various types of procedures which must be described in a carrier's security program, it does not follow that a carrier's program is enforceable under section 108.5 only to the extent that it meets, but does not exceed, those minimum criteria. Furthermore, Respondent's argument is based on the faulty premise that the specific provisions here at issue do not fall within the scope of any of the broad descriptions of required security procedures set forth in Part 108.

In sum, Respondent is required by section 108.5(a) to carry out the security program it adopted. Section VI.A.4. of that program requires Respondent to

See, Exhibit C-1(a), p. 60. Section XIII.D.1. of that program requires Respondent, acting through its employees, contractors, and agents who perform screening functions, to "detect each FAA-approved test object during each screening system operator test conducted by the FAA . . . ." See, Exhibit C-1(a), p. 134. Consequently, Respondent's failures to challenge an unbadged person in the AOA, and Respondent's failures to detect a test object during an FAA test, are violations of section 108.5(a).

II. Unauthorized access cases

In addition to the arguments discussed above, Respondent also makes the following arguments in each of the three unauthorized access cases:

A. Complainant did not prove that Respondent violated the regulatory provision which specifically addresses security of airplanes and facilities, 14 C.F.R. §108.13(a);

B. It is the responsibility of the airport operator, not Respondent,

C. Respondent did not violate the SSP provision requiring it to
the FAA special agent
and

D. The FAA failed to follow its own enforcement policy regarding computation of penalties.

A. Whether Respondent violated section 108.13(a).

Respondent asserts that there is no evidence that it violated 14 C.F.R. §108.13(a), which specifically addresses airplane and facility security. Section 108.13(a) provides:

> Each certificate holder required to conduct screening under a security program shall use the procedures included, and the facilities and equipment described, in its approved security program to perform the following control functions with respect to each airplane operation for which screening is required:
>
> (a) Prohibit unauthorized access to the airplane.

Respondent argues that it did not violate section 108.13(a) because there was no evidence that the FAA special agent, Mr. , who gained access to the AOA in the three

unauthorized access cases had access to any of Respondent's airplanes, nor was there any evidence that any of the unauthorized access cases involved an airplane operation for which screening was required.

Whether the evidence supports a violation of section 108.13(a) is irrelevant because that violation was neither alleged nor found in these cases. The three unauthorized access cases were based solely on Respondent's failure to challenge an unbadged person in the AOA as required by its security program, in violation of section 108.5(a). That violation was clearly established by the uncontradicted evidence in each of the three unauthorized access cases.[9/]

B. Responsibility of airport operator to control access to AOA.

Pursuant to 14 C.F.R. §107.13(a), an airport operator is required to use the procedures and facilities described in its security program to control access to each AOA and to prevent

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9/ Although it is not essential to my disposition of this case, I do note that, contrary to Respondent's interpretation, a violation of section 108.13(a) does not require that unauthorized access to an AOA occur while there is an aircraft in the immediate vicinity that is engaged in, or is about to be engaged in, an operation for which screening is required. Because aircraft constantly come and go from an AOA and may move about within an AOA, any unauthorized access to an AOA -- even at a time when no aircraft are present at the point of access -- may subsequently result in unauthorized access to an aircraft which is, or will soon be, engaged in an operation for which screening is required. Accordingly, it is not unreasonable to require ongoing security measures, such as requiring that all unauthorized or unbadged persons in nonpublic areas be challenged, regardless of whether there are aircraft in the immediate vicinity, in order to prevent unauthorized access to aircraft.

the entry of unauthorized persons onto the AOA. This obligation does not extend to an air carrier's "exclusive area," i.e., that part of an AOA for which an air carrier has agreed in writing with the airport operator to exercise exclusive security responsibility under an approved security program. 14 C.F.R. §§ 107.13(b) and 107.1(b)(3). Respondent asserts that Complainant failed to show that these incidents occurred in Respondent's "exclusive area," and implies that, therefore, the airport operator bore sole responsibility for the security of the AOA.

Respondent's position appears to be based on the incorrect assumption that, because an airport operator's responsibility to control access to the AOA may be relieved by the existence of an "exclusive area" agreement, the lack of such an agreement relieves the air carrier from its responsibility to challenge unauthorized or unbadged persons in the AOA. However, as the law judge correctly noted in his initial decision, the lack of such an agreement under Part 107 is not relevant to the issues in these cases. The fact that the airport operator in these cases may have had some concurrent responsibility for the security of the AOA does not affect Respondent's independent obligation, under the SSP, to challenge unauthorized or unbadged persons in nonpublic areas such as the AOA. Respondent bears this responsibility regardless of whether the AOA is covered by an "exclusive use" agreement.

C. Respondent's obligation to challenge Mr.

Respondent argues that because Mr. , as an FAA special agent, had an identification card which authorized him to be anywhere on the airport, he was not "unauthorized," and Respondent was not

pursuant to the SSP. However, Respondent ignores the plain language of the SSP which states that "

. . . " Exhibit C-1(a), p. 60. Respondent does not dispute that Mr. was unbadged at all relevant times.[10/] Thus, under the SSP, Respondent was

D. FAA's alleged failure to follow its own enforcement policy regarding sanctions.

Respondent argues that the FAA "blindly adhered to and applied a mathematical formula" in determining the sanction in these cases, contrary to the policy set forth in the agency's "Compliance and Enforcement Program," FAA Order No. 2150.3A (hereinafter "FAA Order"), which states that computation of proposed penalties is not done according to a strict

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10/ Nor does Respondent claim that the reason its agents and employees working in the AOA did not challenge Mr. , despite the fact that he was unbadged, was because they recognized him as an FAA special agent. I thus need not decide here whether, if Respondent's employees had recognized Mr. as an authorized FAA special agent, that would have excused the failure to challenge him.

mathematical formula. See, Exhibit Cont-1. In support of its assertion that the FAA impermissibly applied a mathematical formula, Respondent cites the testimony of FAA Security Division manager that, according to the sanction guidance table in the FAA Order, the appropriate range of sanction for this type of violation is $4,000 to $7,499. See, FAA Order No. 2150.3A, Appendix 4, pp. 1 and 7. In each of the unauthorized access cases, Complainant sought a civil penalty of $5,250.

I do not believe that the selection of a sanction within a range of $4,000 to $7,499 is tantamount to the application of a mathematical formula. Nor do I believe that the selection of the sanctions in these cases, in accordance with the ranges set forth in the sanction guidance table included in the FAA Order, was inconsistent with the agency's policy set forth in that Order. The language from the Order cited by Respondent must be read in context:

> Except as otherwise specifically noted in this [Order] or other written agency policy, computation of proposed penalties is not done according to a strict mathematical formula; rather it is a judgment of where the case lies along a spectrum of seriousness.

FAA Order No. 2150.3A, ¶204a.(5) at 15 (emphasis in original). Thus, even if the sanction guidance table could be characterized as a mathematical formula, it is still not contrary to the general policy against application of such a formula, which applies only when not "otherwise specifically noted."

Respondent's arguments must fail for an even more fundamental reason. That is, the law judge modified the sanctions sought in the complaints to $5,000 in two of the three unauthorized access cases, and to $4,000 in the remaining case. In considering the sanction issue, the law judge noted that no explanation had been offered for the $5,250 figure. Accordingly, he stated that he would apply his own judgment as to the appropriate sanction in each case, and made clear that his conclusion was based on his review of the testimony in the case and whether Respondent was in actual physical control of the AOA in question in each case. Accordingly, Respondent's argument that the sanctions sought in the complaints were improper is misplaced. Respondent is entitled to appeal only from the findings and/or conclusions in the initial decision, not the allegations of the complaint. See, 14 C.F.R. §13.233. Respondent has not argued that the sanctions as modified by the law judge in the initial decisions were improper.

III. Test object cases

In addition to the common arguments discussed in Section I above, Respondent advances these additional arguments in the two test object cases:

A. The FAA did not fully follow the testing procedures set out in the SSP;

B. The FAA failed to follow its own enforcement policies regarding computation of penalties;

C. The FAA's policy of seeking a civil penalty for every failure to detect a test object is a standard of perfection which is arbitrary, capricious, and unreasonable; and

D. The law judge's initial decisions are not supported by a preponderance of the evidence.

A. FAA's alleged failure to follow testing procedures described in the SSP.

Respondent argues that the agency has impermissibly applied a "double standard" in these cases because it is strictly enforcing the SSP requirement that Respondent detect every FAA-approved test object, but it did not conduct the tests in these cases in full compliance with the procedures set out in the SSP. Specifically, Respondent asserts that the following deviations from the requirements of the SSP are fatal to the agency's case: (1) the FAA testers who conducted these tests of the x-ray screening devices did not include at the same time a test of the walk-through metal detector and a physical search; (2) the FAA did not rotate test objects as required in the SSP; and, (3) the FAA actually tests screening points (locations), rather than individual screeners.

The relevant provision in the SSP reads:

D. FAA Testing

Exhibit C-1(a), p. 134-135.

Regarding Respondent's first challenge, the law judge held, and I agree, that the above language must be interpreted so as to permit tests to be conducted in individual segments, each involving one component of the checkpoint (i.e., metal detector, X-ray screening device, or physical search). But even if the provision is read so as to require testing of all components of the checkpoint during an FAA test, Respondent has not alleged how it was prejudiced in these cases by the FAA's failure to test the walk-through metal detector and physical search procedures on these occasions. The clear purpose of the testing protocol is to provide protection to the traveling public. It is not intended to serve as a shield for the carrier in enforcement proceedings.

With regard to the rotation of test objects, Respondent points to the testimony of FAA Principle Security Inspector that he selected the test object used in one of the tests at random. Respondent asserts that the rotation requirement, which is intended to ensure that screeners are tested on all objects, is "essentially ignored and disregarded by the FAA" because the FAA tests checkpoints, not screeners. However, as the law judge held, this asserted lack of rotation is not established by the record in this case. I note that FAA

Security Division manager testified that records are kept in the field offices which indicate the specific screening point and the screener on duty at the time of a test, in order to ensure rotation. In any event, as noted above, the intended beneficiary of the test protocol is not the carrier, but the public.

With regard to the testing of screeners, rather than checkpoints, I see no significant difference between the two approaches, nor do I see any prejudice to Respondent in the agency's adoption of one approach over the other.

The agency attorney is not obligated to prove, as an element of the violation in this type of case, that test objects were rotated prior to the test at issue, or that the FAA tests screeners rather than checkpoints. These issues are irrelevant to whether a violation occurred in these cases. Respondent has not alleged any prejudice, nor can I perceive of any that might result from the agency's failure to rotate the test objects used with a particular screener.

B. FAA's alleged failure to follow its own enforcement policies regarding sanctions.

Respondent again argues, as it did in the unauthorized access cases, that the FAA impermissibly applied a "mathematical formula" in determining the sanction in these cases, contrary to the policy set forth in FAA Order No. 2150.3A. In support of its assertion, Respondent cites testimony regarding the recommended amounts of civil penalties for an air carrier's failure to detect a test object: $10,000

when there have been one or more prior failures during the last 20 tests at that checkpoint (i.e., when the detection rate was 95% or less); and $1,000 when there have been no prior failures in the last 20 tests at that checkpoint (i.e., the detection rate was better than 95%). This guidance is set forth in the intra-agency memorandum, signed by the FAA's Director of Civil Aviation Security, which was provided to Respondent during discovery. See, Exhibit Cont-2. Respondent challenges this guidance because it fails to take into account whether the prior "failures" have been appealed, and the ultimate result of such an appeal.

The agency's general policy against application of a "mathematical formula" applies only when not "otherwise specifically noted in [FAA Order No. 2150.3A] or other written agency policy. See, FAA Order No. 2150.3A, ¶204a.(5), p. 15 (emphasis added). The memorandum signed by the FAA's Director of Civil Aviation Security is a written agency policy. Thus, to the extent those specific guidelines are inconsistent with the general guidance contained in FAA Order No. 2150.3A, the specific guidelines contained in the memorandum supersede that general guidance. In any event, the selection of sanctions pursuant to the guidelines in the memorandum is consistent with the agency's sanction policy contained in FAA Order No. 2150.3A. The highest civil penalty amount recommended in the memorandum ($10,000) falls within the "normal range" listed in the sanction guidance table contained in the FAA Order for a

single violation of "failure to detect test objects" ($7,500-$10,000). See, FAA Order No. 2150.3A, Appendix 4, pp. 1 and 7. And in cases where there has been a prior detection rate of better than 95%, the $1,000 civil penalty recommended in the memorandum falls well below the "normal range."

Even assuming the memorandum represents an impermissible "mathematical formula," Respondent has not been prejudiced by the existence of the memorandum, or by the FAA's application of its guidelines in these two cases. As discussed further below, the law judge did not not rely on the memorandum, but rather, applied his own judgment as to the appropriate sanction in each case.

In CP89EA0045, the law judge affirmed the relatively low $1,000 civil penalty sought in the complaint without citing or otherwise relying on the memorandum's guidelines. He made clear that his conclusion was based on his own evaluation of the circumstances of the case, which, in his judgment, raised a serious question regarding airline security and the safety of airline passengers. Although Complainant had attempted to introduce evidence as to the prior history at the checkpoint, that evidence was rejected.

In CP89NM0029, although Complainant attempted to rely upon the sanction policy set forth in the memorandum to support the $10,000 civil penalty sought in the complaint, the law judge

explicitly rejected that sanction policy on the basis that it was "too mechanical," and based on insufficient information. Accordingly, he declined to apply that policy. Based on his own consideration of the circumstances of the case, including what he considered to be aggravating factors (light "traffic" at the checkpoint, and FAA records showing two prior failures at that checkpoint within the past 20 tests), he affirmed a modified sanction of $7,500. The law judge noted that without further details, it was impossible to assess the "seriousness" of those violations. He concluded, however, that the records were "probably accurate," and he considered the prior failures as only one factor in evaluating the appropriate sanction.

With regard to Respondent's assertion that the FAA's sanction policy denies it due process to the extent that it does not take into consideration that prior "failures" may be on appeal, I would first note that the record does not indicate whether that is actually the case or whether Respondent has raised a purely hypothetical issue.

While I recognize that the law judge's conclusion that this case warrants a $7,500 civil penalty was based at least in part on the existence of Respondent's prior "failures" at this checkpoint, I will not disturb that conclusion because the record contains no evidence, or even any suggestion, that the prior incidents of test object "failures" listed in Exhibit C-12 were in fact on appeal. I will, however, allow Respondent

a final opportunity to supplement the record in this case with such a showing, through a petition for reconsideration or modification of this decision. Any such petition should be filed within 30 days of service of this decision, pursuant to 14 C.F.R. §13.234, and should include documentary evidence showing that at the time of the hearing in this case, Respondent had appealed the "failures" listed on Exhibit C-12. I will give due consideration to any such evidence, and, if warranted, I will issue an amended or modified decision.

This discussion should not be construed as a holding that the respondent in a test object case always bears the burden of proving "failures" have been successfully appealed or are on appeal. The contrary argument -- that the agency should be required to show the absence of an appeal before it can rely on prior "failures" in setting the appropriate sanction -- could also be made. Because neither the law judge nor the parties addressed the burden of proof issue, I will not decide that issue here.

C. FAA's policy of seeking a civil penalty for every failure to detect a test object.

Respondent argues that the FAA's policy of seeking a civil penalty for every failure to detect a test object[11/] is a

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11/ This policy is contained in the intra-agency memorandum, signed by the FAA's Director of Civil Aviation Security, which was provided to Respondent during discovery. Exhibit Cont-2. Pursuant to the guidance in that memorandum, a $10,000 civil penalty is recommended for a test object failure when the detection rate for the last 20 tests at that checkpoint is less than 95%; a $1,000 civil penalty is recommended when the detection rate is better than 95%.

standard of "perfection" which is arbitrary, capricious, and in violation of the agency's mandate to prescribe "reasonable" regulations. See, 49 U.S.C. App. §1356(a) and §1357(a).

The policy of seeking a civil penalty for every failure to detect a test object is not arbitrary, capricious, or unreasonable. Each such failure is evidence of a breakdown in the carrier's security screening procedures, and represents a potential threat to the safety of the traveling public. Each such failure is also contrary to the SSP, which requires the carrier to " ," and thus constitutes a violation of 14 C.F.R. §108.5. Under sections 901 and 905 of the Federal Aviation Act (49 U.S.C. App. §1471 and §1475) the agency is authorized to assess civil penalties for any violation of the Act, or any rule regulation, or order issued thereunder. These cases represent a lawful exercise of that authority.

D. Sufficiency of the evidence in support of the law judge's findings that Respondent violated 14 C.F.R. §108.5(a).

Respondent argues that Complainant did not sustain its burden of proving the alleged violations in these cases. Although Respondent does not dispute the testimony of the FAA testers that, in each case, the test object was clearly visible on the screen when the x-ray screening procedure was repeated immediately after the test failure, Respondent asserts that there is no conclusive evidence that the test object was discernible a few moments earlier during the test itself. Respondent notes that each FAA tester noted that the screener was watching the screen conscientiously.

Respondent's argument is unpersuasive. Respondent does not dispute that its security screeners failed to detect the FAA-approved test objects used during these two tests of the screening system. These failures were in violation of Section XIII.D.1. of the SSP, which in turn constitutes a violation of 14 C.F.R. §108.5(a). Accordingly, Respondent's suggestion that the objects may not have been visible on the screen during the test can only be characterized as an affirmative defense. That defense is rejected.

Although there is no direct evidence that the test objects were visible on the screen the first time they passed through the x-ray devices, there is ample circumstantial evidence to establish that fact in each case.[12/] Both FAA testers testified that the test objects used in their respective tests were clearly visible when they were passed through the x-ray device immediately after the test failure. This raises a strong inference that the objects were equally visible when they were passed through the device during the test itself a few moments earlier. Respondent has not rebutted this strong circumstantial evidence. Accordingly, the preponderance of the evidence supports the law judge's finding that Respondent, through its security screeners, failed to detect the FAA-approved test objects used in these cases, as required by its security plan, in violation of 14 C.F.R. §108.5(a).

12/ A party may use circumstantial evidence to sustain its burden of proof. Continental I, at p. 20.

THEREFORE, in light of the foregoing, Respondent's appeals are denied, and the law judge's initial decisions are affirmed.[13/] Civil penalties in the following amounts are hereby assessed:[14/]

1. In Docket No. CP89EA0058, $5,000;
2. In Docket No. CP89EA0047, $5,000;
3. In Docket No. CP89EA0028, $4,000;
4. In Docket No. CP89EA0045, $1,000; and
5. In Docket No. CP89NM0029, $7,500.

JAMES B. BUSEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 7th day of November, 1990.

13/ I have also considered whether any changes made in the Rules of Practice during the pendency of this case may have affected the result in this case, and have concluded that no change in the Rules is pertinent to this case. If Respondent believes that changes in the rules would have affected the outcome of this case, Respondent may file a petition for reconsideration of this decision and order, pursuant to 14 C.F.R. §13.234. Such a petition for reconsideration must include a particularized showing of harm, citing the specific rule change (or changes) and its relevance to the challenged findings or conclusions. See, 55 Fed. Reg. 15110, 15125 (April 20, 1990). Although the filing of a petition for reconsideration does not normally stay the effectiveness of the Administrator's decision and order, under these circumstances, if Respondent files such a petition I will stay the effectiveness of this decision and order pending disposition of the petition.

14/ Unless Respondent files a petition for reconsideration within 30 days of service of this decision (as described above), or a petition for judicial review within 60 days of service of this decision (pursuant to 49 U.S.C. App. §1486), this decision shall be considered an order assessing civil penalty. See, 55 Fed. Reg. 27574 and 27585 (1990) (to be codified at 14 C.F.R. §§13.16(b)(4) and 13.233(j)(2)).